Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

MARSHA McMASTER,

Petitioner,

vs.

IOWA BOARD OF PSYCHOLOGY EXAMINERS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the patient has an absolute constitutional right of privacy in the records of a psychiatrist/psychologist/counselor or other mental health practitioner.

2) Whether, upon finding a constitutional right of privacy in medical records, the Iowa Courts unconstitutionally abridged that right to privacy by providing for an *in camera* review of those documents when there is already a less intrusive means of obtaining the information the Board of Psychology Examiners seeks in this case, thus effectively depriving the patient of her right to privacy in her medical records, if that right is not absolute.

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OPINIONS BELOW

The district court of Iowa for Polk County, 5th Judicial District, The Honorable Glenn E. Pille presiding, ruled that Iowa Code § 258A was broad enough to reach the records of Susan M. Guenther even though Susan M. Guenther was not under investigation by the Board and over any and all privilege asserted by the patient in this matter, Marsha McMaster. This Opinion was filed on November 19, 1992, and is set forth in the appendix at A-36.

This ruling was appealed to the Supreme Court of the State of Iowa which heard the case en banc. The Supreme Court ruled that Ms. McMaster did have a right to privacy in her psychiatric records, but that the right was not absolute, and could be overcome by the state by a request to the District Court to review the file in camera and then having the District Court make a determination as to whether the information contained within those documents was relevant to the case before the Board of Examiners. This ruling was filed on the 22nd day of December, 1993, and is set out in the appendix at A-1.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* § 1257. The final disposition of this case below was the decision of the Iowa Supreme Court, en banc, filed December 22, 1993.

CONSTITUTIONAL PROVISIONS INVOKED

The fourteenth amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, due process of the laws.

STATEMENT OF THE CASE

This case presents a set of circumstances wherein a certain psychologist is under review by the Iowa Board of Psychology Examiners. Under Iowa Statute § 622.10, Iowa Code (1991) a confidential patient/mental health professional relationship when established has been interpreted as a statute that is to be liberally construed. On the other hand, Iowa Code § 258A.6 is purported to abridge the privilege afforded by Iowa Code § 622.10, when such records are subpoenaed by a Board of Examiners in a profession as that Board attempts to carry out its powers as a disciplinary agency of that Board's particular profession.

In this case, the facts are not in dispute. At some point prior to October 14, 1992, Marsha McMaster n/k/a Marsha Hines, referred to herein as Marsha McMaster for purposes of clarity, became aware that the Iowa Board of

Psychology Examiners was attempting to obtain her personal and confidential records from her private psychologist, Susan F. Guenther. The Board of Psychology Examiners did not seek or obtain Marsha McMaster's permission to subpoena these records. Upon becoming aware that such a subpoena was imminent, Ms. McMaster filed suit against the Iowa Board of Psychology Examiners and Susan F. Guenther by way of a Petition to the District Court of Polk County for a Temporary and Permanent Injunction and Motion to Quash Subpoena. Such an Order was granted ex parte by the Honorable Richard Morr, Chief Judge of the 5th Circuit, Polk County, Iowa, and restrained Susan Guenther from "releasing or surrendering any and all records in her possession pertaining to the nature and purpose of the client relationship between the Plaintiff and the said Susan F. [sic] Guenther, to any person, agency or board. Hearing was set on a permanent injunction on November 6, 1992."

On October 21, 1992, the Iowa Board of Psychology Examiners, hereinafter referred to as the "Board", did in fact serve Susan Guenther with a subpoena demanding copies of all clinical records pertaining to Marsha McMaster within five (5) days of its issuance. On November 6, 1992, the Iowa Board of Psychology Examiners filed a Motion to Dismiss the action of Ms. McMaster on the grounds that it was premature since Ms. McMaster had not exhausted all of her remedies under the Iowa Administrative Code. On that same date, the Board also filed a Petition to Enforce their subpoena.

Without ruling on the Motion to Dismiss, the Court, with agreement of all parties, allowed Marsha McMaster to enter into that action as Intervenor so that she might

have standing in that action before the Court. Hearing was held on that matter and the Honorable Judge Glenn E. Pille presided over the hearing. The Honorable Judge Pille ruled that Iowa Statute § 258A was broad enough to reach the records of Susan M. Guenther, even though Susan M. Guenther was not under investigation by the Board and over any privilege asserted by Marsha McMaster in this matter. The District Court ordered the Subpoena enforced, but granted a stay on its enforcement for twenty (20) days. If any party chose to appeal his ruling within that time frame, the enforcement of the subpoena would be stayed until the resolution of the pending appeal.

Marsha McMaster did in fact file an appeal of the District Court ruling with the Supreme Court of Iowa within that twenty (20) day time span and the subpoena was stayed from enforcement. The Supreme Court of Iowa heard this matter en banc and issued its ruling thereon on December 22, 1993. The Iowa Court ruled that the patient, Marsha McMaster, did have a constitutional right to privacy in her mental health records. However, it also ruled that the right was not absolute and could be overcome by the state by a request to the District Court to review the file in camera and then having the District Court make a determination as to whether the information contained within those documents was relevant to the case before the Board of Examiners.

Marsha McMaster is a private citizen residing in Polk County, Iowa. At some point, psychologist Susan Guenther became Ms. McMaster's personal counselor. (Trans. p. 30). Susan Guenther is a licensed psychologist

practicing in the state of Iowa. She is not under investigation by the Iowa Board of Psychology Examiners, neither has she been charged with any violation of the Ethical Canons of the Board, nor has any hearing been set to review Dr. Guenther before the Iowa Board of Psychology Examiners. (Trans. p. 9).

At some unnamed point in time, the Board did receive a complaint with regard to Dr. Todd Hines, a psychologist practicing in the state of Iowa. (Trans. pp. 25-26). Dr. Hines was a psychologist for Marsha McMaster prior to Ms. McMaster's retention of Susan Guenther as her psychologist. The complaint concerns some alleged misconduct between Dr. Hines and his patient, Marsha McMaster, during their mental health professional-patient relationship. (Trans. p. 23). Marsha McMaster did not initiate that complaint. (Trans. pp. 24-25).

Marsha McMaster has never authorized the release of her records from Susan M. Guenther to the Iowa Board of Psychology Examiners. (App. p. 27). Neither has the Board sought a release of those records from Marsha McMaster. (Trans. pp. 27-28). Marsha McMaster does not want her records currently in the hands of Susan M. Guenther to be released to the Board. (App. pp. 1-3). Ms. McMaster was shocked, indignant and outraged to learn that her personal, private and what she thought to be confidential conversations with her private psychologist, were going to be subpoenaed by the Board. (Aff. pp. 1-3). Ms. McMaster believes that she will suffer irreparable harm if these records are released. (Aff. pp. 1-3). Ms. McMaster believed that she was in a confidential relationship with Dr. Guenther and that a release of the confidential records surrounding that relationship would be a

violation of her constitutional right to privacy. (Aff. pp. 1-3). This constitutional right of privacy is recognized by case law beginning with *Griswold v. Connecticut*, 381 U.S. 479 (1965). In this instance, it is based on the fact that there are "certain areas and zones of privacy" based on the concept of personal liberty found in the Fourteenth Amendment to the Constitution of the United States.

The Board has no knowledge at the present time as to what the records in the hand of Susan Guenther contain. (Trans. p. 33). The best information that the Board gave to Judge Pille is that because of the time frame of the professional relationship between Dr. Guenther and Marsha McMaster, the records sought *might* have some significance to the investigation of Dr. Todd Hines. (Trans. p. 33). Solely on this basis, the Board has sought to have these records released, first without benefit of a subpoena, and then under a subpoena. (Trans. pp. 26-28).

Dr. Todd Hines has turned over all of his records to the Iowa Board of Psychology Examiners. Under Board Rule 240, Iowa Administrative Code 212-13, the Board imposes on all psychologists practicing within the state of Iowa a duty to report to the Board any wrongdoing or unprofessional actions of any other psychologists practicing within the state of which said psychologist becomes aware. Therefore, if Susan M. Guenther had such information in her records, she would already be under an obligation to have reported that wrongdoing to the Board. She has not done so and the Iowa Board of Psychology Examiners has not brought any action against Susan Guenther alleging that she has knowledge which would indicate wrongdoing by Dr. Hines and has failed, under the above-stated rule, to make that knowledge

known to the Board. The interpretation of Iowa Code § 258A given by the Supreme Court of Iowa in its December 22, 1993 ruling, allows broader invasion of the right to privacy than the above Iowa Administrative Code Rule, and is therefore, constitutionally impermissible.

REASONS FOR GRANTING THE WRIT

ISSUE I

WHETHER THERE IS A CONSTITUTIONAL RIGHT TO PRIVACY BY A PATIENT IN THE RECORDS OF A MENTAL HEALTH PROFESSIONAL.

The fact of a right to privacy was first recognized by the United States Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). Since then, the right has been defined to some extent, but its borders are very blurry. *Garguil v. Thompkins*, 704 F.2d 661 (2nd Cir. 1983). While there is no absolute statement in the Constitution that a right to privacy exists, the right to the "dignity of one's bodily integrity" has been recognized since the inception of common law and was identified as far back as the Magna Carta. *Id.*

The Supreme Court has held that the Constitution protects "certain areas and zones of privacy" based upon the concept of personal liberty found in the fourteenth amendment. *Shields v. Burge*, 874 F.2d 1201, 1209 (7th Cir. 1989); *citing Whalen v. Roe*, 429 U.S. 589 (1977); *Roe v. Wade*, 410 U.S. 113, 152-153 (1973).

In *Whalen*, the Court stated that this right to privacy protects two different kinds of interests: 1) the individual interest in avoiding disclosure of personal matters, and

2) the interest of being able to make independent decisions in certain important areas. *Shields*, 874 F.2d at 1209. Other Court's of Appeal have characterized these two interests as "confidentiality" and "autonomy". *Id.*

The Supreme Court has never fully developed what the exact nature of a right to privacy is, nor how broad its scope. *Id.* To the knowledge of this Appellant, the Supreme Court has never ruled on whether there is a right to privacy in mental health records. The Court has stated that the right to privacy protects only those personal rights that are "fundamental" or "implicit in the concept of an ordered liberty." *Roe v. Wade*, 410 U.S. at 193. The Supreme Court has further found that the right to privacy definitely included rights to make decisions relating to family matters including marriage, procreation, abortion, contraception, family relationships and child rearing, and education. *Shields*, 874 F.2d at 1210.

Because of this lack of authority from the highest Court in the land, state Courts and Federal District and Circuit Courts have taken the bull by the horns themselves. Not surprisingly, this has resulted in a great diversity of opinion about the existence, nature and scope of a right to privacy in mental health records. What follows is not intended in any way to be an exhaustive list of the cases decided in lower courts of all natures on this matter, but it is intended to act as a statement of the confusion that exists over this matter.

In *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1982), the Court found that no right to privacy exists as to medical records. Again in the 5th Circuit, the Court in *United States v. Meagher*, rejected the idea of a right to

privacy in medical records. *United States v. Meagher,* 531 F.2d 752 (5th Cir.), *cert. denied,* 429 U.S. 853 (1976). In *J.P. v. DeSanti,* 653 F.2d 1060, 1088 (6th Cir. 1981), the Court found that just because the Supreme Court has found a protected constitutional right to privacy in some situations, does not mean that it protects all aspects of individual privacy. This Circuit Court went on to say that the Supreme Court had found that its guarantee of personal privacy must be limited to rights which are "fundamental" or "implicit in the concept of ordered liberty." *Id.* Moreover, the Sixth Circuit Court said, "[a]bsent a clear indication from the Supreme Court we will not construe isolated statements in *Whalen* and *Nixon* more broadly than their context allows to recognize a general constitutional right to have disclosure of private information measured against the need for disclosure. *Id.* at 1089. The Court went on to say, that inferring a "broad constitutional" right where the Constitution itself does not express one, is not an appropriate activity for the judiciary. *Id.* at 1090. The Court then noted that in no case which was cited to stand for the proposition that there is a right to privacy, has any Constitutional provision been cited as supporting that conclusion. *Id.*

On the other side of the ledger, the following cases have found that there is a right to privacy in mental health and medical records, *In re Zuniga,* 714 F.2d 632 (6th Cir 1983); *Caesar v. Mountanos,* 542 F.2d 1064 (9th Cir. 1976), *cert. denied,* 430 U.S. 954 (1977); *Hawaii Psychiatric Society, Dist. Branch v. Ariyoshi,* 481 F. Supp. 1028 (D.Hawaii 1979); *United States v. Westinghouse Electric Corp.,* 638 F.2d 570 (3rd Cir. 1980); *Borucki v. Ryan,* 827

F.2d 836 (1st Cir. 1987); *In the Matter of A-85-04-38,* 525 N.Y.S.2d 479.

The fact that the Supreme Court has not ruled on this issue previously coupled with the disunity of the rulings at the District Court and Circuit Court levels has caused problems for the lower Courts and for those whose rights have been violated. For instance in *Borucki v. Ryan,* the Plaintiff alleged that the State had done him irreparable harm by leaking testimony from his psychiatric report to the public and press. *Borucki,* 827 F.2d at 837. However, the state officials had a qualified immunity argument unless it could be shown that they violated a clearly established statutory or constitutional right. *Id.* In determining whether *Borucki could recover, the Court stated that* because a constitutional right to privacy in psychiatric records had not been clearly stated by the Supreme Court and it had been variously decided in the lower courts, the leak of his psychiatric records did not rise to a breach which did away with the state's qualified immunity. *Id.* at 844-845. This kind of situation will continue to exist so long as this Court does not make a stand on the issue of the right to privacy in mental health records.

Mental health records are a hybrid in the field of medicine. It has been stated that among physicians, the psychiatrist has a special need to maintain confidentiality. *Zuniga,* 714 F.2d at 638. The mental health professional's ability to help his or her patient is totally dependant upon the willingness and ability of the patient to talk to him or her. *Id.* In fact, it has been reliably stated that confidentiality is the *sine qua non* of a successful mental health relationship between patient and doctor. *Id.* Psychiatrists not only explore their patient's consciousness,

but probe into the patient's unconscious thoughts and feelings as well. *Id.*

> Further, many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him. 'The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they know that all they say – and all the psychiatrist learns from what they say – may be revealed to the whole world from the witness stand.'

Id. citing *Taylor v. United States,* 222 F.2d 398, 401 (D.C. Cir. 1955) quoting Guttmacher and Weihofen, Psychiatry and the Law (1952) p. 272.

The psychiatric patient's innermost thoughts may be so "frightening, embarrassing, shameful or morbid that the patient in therapy will struggle to remain sick, rather than reveal those thoughts even to himself." *Hawaii Psychiatric Society, Dist. Branch v. Ariyoshi,* 481 F. Supp. at 1038.

Due to the very nature of the treatment, if a patient feels that the psychotherapist could be compelled to reveal the private communications that he or she has had with that therapist, that person can be deterred from seeking treatment. *Id* citing J. Katz, J. Goldstein & A.

Dershowitz, *Psychotherapy, Psychoanalysis and the Law,* 726-27 (1967). "Mental illness may prevent one from understanding religious and political ideas, or interfere with the ability to communicate ideas. Some level of mental health is necessary to be able to form belief and value systems and to engage in rational thought." Smith, *Constitutional Privacy in Psychotherapy,* 49 Geo. Wash. L. Rev. 127 (1980). Therefore, the interest of the patient in seeking treatment, mirrors society's interest in having the mentally unwell person treated. *Zuniga,* 714 F.2d at 639. If one is not successfully treated for his or her mental illness, society could well suffer because a mentally ill person often poses danger to society as well as to his or herself. Clearly, this is a relevant and riveting issue which in some way can affect each and every one of us in our daily lives and routines.

This is a particularly good case for this Court to finally utilize to make its statement that there is a constitutional right to privacy in psychiatric (mental health) records. Those records treat with both the confidentiality prong of the constitutional right to privacy and perhaps, as shown in the paragraph above, more pertinently with the autonomy branch. Unless a person feels free to share his innermost thoughts and fears with his or her mental health professional, he or she may never even seek treatment. This can be life-threatening to those innocent bystanders who then must come into contact with the mentally ill person.

In this case we have a totally innocent person. Marsha McMaster has committed no crime nor is she charged with one. She is not being seen by a psychologist because of a job she is seeking. She was seen of her own

volition to deal, one assumes, with some problem in her life with which she could not cope without the help of a psychological nature. Her sin, so to speak, was to see a psychologist who is now under investigation by the Board. Certainly this state of affairs was not something she could anticipate and thereby avoid. But now, because she saw this professional, her private thoughts are to be open fodder for the Board to feast on. This is true not only of her private thoughts with regard to Dr. Hines, the psychologist under investigation, but also those she expressed to another mental health professional, Susan Guenther, who is not under investigation. The only thing Marsha has done is to take steps to become well, nothing more and nothing less. In that pursuit, she has seen at least two mental health professionals, Dr. Todd Hines, and Dr. Susan Guenther. She has shared with these two individuals her most private thoughts and feelings and now the Board of Psychology Examiners wants to make those conversations public in a legal proceeding which Marsha did not initiate and which does not concern her. The Board hopes to do this by subpoenaing records from a psychologist who is not under any investigation for disciplinary reasons and without the approval of the patient, and in fact over the cries of the patient for privacy.

The Board is on a fishing expedition. It has no idea what information is contained in those records. (Trans. pp. 32-34). Its only indication of why these records were wanted is that Ms. McMaster was a patient of Dr. Guenther's in a time period that may or may not be "relevant" to the time period about which Dr. Hines is

being investigated. (Trans. p. 33). No other explanation was given, although the question was very plainly asked.

Dr. Hines, the psychologist who is actually being investigated by the Board, has turned over his records as the Board requested. But under the circumstances of this case, this Court should not allow the right to privacy to be further eroded. If the Court does not take a stand and grant absolute immunity from discovery under these conditions, then the state courts and the federal district and circuit courts will continue to make the right to privacy in mental health records a hit and miss and piecemeal hodge-podge of non-uniform laws. Patients will stay away from treatment and society will continue to be damaged and endangered. In fact, one supposes that none of us would be immune of the dangers imposed by this state of affairs as none of us has any guarantees that we will remain free of the need of seeing a mental health professional. Neither, would we have any way of avoiding just such another situation as the one at bar as we could not know in advance that the professional we chose as our confidant, would one day be investigated and in that process, make our thoughts public records.

Wherefore, the Appellant, Marsha McMaster, prays, that this Court will take this matter for the purpose of finally establishing that in a situation such as this one, where the patient whose records are sought is totally innocent of any wrongdoing of any nature, one does have an absolute constitutional right to privacy in his or her mental health records and that where, as here, the records being sought belong to a patient who has not initiated legal action, and who is not involved in that action; one

who is totally innocent of any wrongdoing, the right is absolute.

ISSUE II

WHERE UPON FINDING THAT THERE IS A RIGHT TO PRIVACY, THE IOWA SUPREME COURT THEN ABRIDGED THAT RIGHT UNCONSTITUTIONALLY BY ALLOWING FOR THE VIEWING OF THE RECORDS INVOLVED BY THE COURT IN CAMERA WHEN THERE IS A LESS INTRUSIVE WAY OF GETTING THE INFORMATION WHICH IS ALREADY ESTABLISHED BY STATUTE.

If the Court declines to find an absolute right to privacy, then one has to define when the right attaches and when it does not attach. In addition, one also must define how and when the right can be overcome.

There does not seem to be an argument in the lower courts about this question. If the right to privacy involves only the confidentiality prong of the right, then the Court need only use a balancing test to overcome the right to privacy. *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978). However, when the issue is autonomy, then a compelling state interest must be apparent in order to overcome the right. *Id.* (See also *Caesar*, 542 F.2d at 1069).

In this instance, the right to privacy involves both the confidentiality prong and the autonomy prong. Therefore, the Court must have a compelling state interest in order to abridge the constitutional right. In this case, the state interest is said to be the right of the Board to police its members and make sure that they do not deal with

their patients in ways which are unethical or unapproved. There is no question that this is a legitimate state interest. Certainly, any sick person is less likely to be able to act on his or her own behalf. When that sickness is of a mental health nature, the lack of ability to act on one's own behalf is presumably even greater.

In this regard Iowa, while clearly establishing a right of patient/mental health professional confidentiality, has also allowed that confidentiality to be breached in certain limited areas. One of those areas is with the Board in its activities as an agency policing the actions of its licensees under Iowa Code § 258A.

Still, there is a large question as to whether the records desired in this instance are in any way relevant to the policing of a mental health practitioner. The Board thinks these records might be relevant because of the time frame of the relationship which was a time subsequent to the previous mental health provider/patient relationship between Dr. Hines and Marsha McMaster.

Remember here that the practitioner who is under investigation for some alleged wrongdoing is Todd Hines. Remember also that Dr. Hines' records have been turned over to the Board. However, Susan Guenther has been accused of no wrongdoing and is not under investigation. Neither has Marsha McMaster been accused of any wrongdoing and she is not under investigation either. So what possible reason could the Board have for wanting Susan Guenther's records? Obviously because the Board feels that in some way those records will help it to police what may have been unethical activities of Dr. Todd Hines.

Assuming arguendo that this policing constitutes a compelling state interest, and that Marsha McMaster has a legitimate right to privacy in those records, then the method of attainment of those records must be the way of the least interference with the right possible. *Attorney General of N.Y. v. Soto-Lopez*, 476 U.S. 898, 907-8 (1985). In addition, there must be in place, effective security measures which protect against public exposure subsequent to the Board attaining the information. *Westinghouse*, 638 F.2d at 579.

In the case at bar, the "security measures" which are in place are that the Board must make a "minimal showing" that the complaint reasonably justifies the subpoena in the furtherance of the investigation which is being conducted. (IA Supr. Ct. Ruling P. 12). Second, the Board mut establish that the records are necessary to the investigation being conducted by the Board. (IA Supr. Ct. Ruling p. 12). In order to show this necessity, the Iowa Supreme Court established a system of in camera inspection of the records by the Court. (IA Supr. Ct. Ruling p. 13). The Court then, which is a second entity, not the Board itself, must view those records in camera and must determine if the material contained in the reports is "relevant to the investigation", whatever that may mean. (IA Supr. Ct. Ruling p. 13). Once the Court has determined that portions of the record are "relevant", then the Board is to have access to those relevant portions. (IA Supr. Ct. Ruling p. 13). In addition, all identifying information about the patient is to be removed before the records go to the district court. (IA Supr. Ct. Ruling p. 13). Third, the Board must show that it has notified the patient and attempted

to get authorization from the patient before issuing a subpoena. (IA Supr. Ct. Ruling p. 14).

It should be noted here, that the board in this case did none of the above, but is being given a second chance by the Iowa Supreme Court to do those things, if it can, on remand to the district court. In his dissent in the Iowa Supreme Court case, Justice Snell sizes up these "safeguards" as follows:

> The constitutional right of privacy should extend to the patient records of mental health professionals, as held by the majority. However, the majority fractures this principle, by holding that a sufficient showing of need by the Board of Examiners will prevail over the right to privacy protection. I do not concede that the privacy privilege can be overcome by any showing of some compelling need for the information sought by the Board of Psychology Examiners . . . "Where certain fundamental rights are involved, the Court has held that regulations limiting these rights may be justified only by a compelling state interest, and that legislative enactments must be narrowly drawn to express only the legitimate interests at stake." (cite omitted). If there is a less drastic means to achieve a compelling state interest with a lesser burden on constitutionally protected rights, the state *must* utilize those means. (cite omitted). The State cannot employ means that broadly stifle fundamental liberties when the end can be more narrowly achieved . . . The fact that the majority provides for in camera review does not alleviate the constitutional concerns in this case. Nor does the majority's requirement that the Board show that the patient's confidential records are

> relevant to the investigation provide any real privacy protection. Disagreements about what is relevant have fueled lawyers and judges for hundreds of years. And, whatever decision is made by the district court is appealable through the state or federal appellate process, automatically expanding the in camera inspection to scores of more reviewers . . .

(IA Supr. Ct. Ruling pp. 5-7). In addition Iowa Code § 258A.6 (4) makes clear that information gathered by the Board loses all privacy protection. Professional records, papers, and correspondence even if they are privileged under the law, become evidence in the disciplinary hearing. *Id.* In addition, Subsection (4) of Iowa Code § 258A.6 further provides that a final written decision and findings of fact of the licensing Board itself, becomes public record. What this means is that the most intimate thoughts, fears, sins of the patient may well appear as supporting facts in the Board's decision, open for all the world to see. These are the thoughts that the patient does not want to even admit to him or herself, and the veil of anonymity frankly is made of netting with holes so wide as to be virtually no veil at all. Clearly in this case, Ms. McMaster's purported anonymity is already shot in the foot and provides her with no protection at all. Even with the "safeguards" propounded by the statute and those added by the Iowa Supreme Court, the span of Iowa Code § 258A is not narrowly tailored to meet the needs of the Board for records of a mental health practitioner who is not under investigation by the Board for any reason.

The fact is, there is another means of providing the information necessary already in existence in Iowa. That means is encompassed in Rule 240, Iowa Administrative

Code 212-213. This rule imposes upon all members of the profession, an affirmative duty to report to the Board any and all violations of which they are aware on the part of another licensee of the Board. Susan Guenther would therefore, be bound, under the above mentioned rule, to report to the Board with regard to any violations of Dr. Todd Hines that she was aware of due to her mental health care/patient relationship with Marsha McMaster, or through any other source.

The fact is that Susan Guenther has not reported to the Board any violations of which she is aware with regard to Dr. Todd Hines. Obviously, it is that information which the Board is seeking in subpoenaing these records from Susan Guenther in regard to the Board's investigation of Dr. Hines for violating its rules with regard to his professional association with Marsha McMaster. Since Susan Guenther has not made such a report to the Board, one can assume that she has nothing to report. If one assumes anything else, then Susan Guenther is in violation of the rules of ethics of the Board. However, according to the District Attorney of the State of Iowa who represented the Board in this matter, Susan Guenther has not been charged with any such violation. (Trans. p. 38).

In order to make such a report to the Board, Susan Guenther might, at some point need to turn over some of Marsha McMaster's records to the Board to corroborate her assertion that some violation had taken place between Dr. Hines and Marsha McMaster. However, this portion of records would naturally be very small, the review of the records for relevancy would be by the mental health professional himself or herself and not by a third party

such as the Court, and any part of the records turned over to the board would be limited to specifically those statements of Ms. McMaster which relate to Dr. Hines. All the rest of her private conversations with Susan Guenther would remain inviolate. There would be no need for any in camera inspection of *all* of Marsha McMaster's records and no need for anything beyond what Marsha said about the violation itself to ever come into the Board's or the Court's hand.

It should be noted, that under this set of circumstances, the Board would not be subpoenaing information in a fishing expedition, looking for possible evidence of some as yet unnamed violation of Dr. Hines. In this case, the Board would have evidence from Susan Guenther that, at least in her opinion, a violation had occurred under which Marsha McMaster was somehow illegally or unethically treated by Dr. Hines. The Board would certainly be acting in a capacity as protector for Marsha McMaster, who, at least theoretically is unable to protect herself. This would possibly provide a compelling state interest.

It is quite obvious here, that if one assumes that the right to privacy in mental health records exists, but can be overcome by a compelling state interest, then there is already in place a less intrusive means of obtaining the information sought under Rule 240 of the Iowa Administrative Code 212-213. Yet instead of telling the Board to utilize the system that is in place, the Iowa Supreme Court created a new means of achieving the ends of obtaining the records of a psychologist not under investigation by the Board. That new means, in camera inspection of the whole of the patient's mental health records to

determine their relevancy, is much more intrusive than the tool already in place to accomplish the same end.

In that the Iowa Supreme Court has created a means of subpoenaing information from a mental health professional not under investigation which is more intrusive than the means which is already in place, the Iowa Supreme Court has unconstitutionally violated the right to privacy in Marsha McMaster's records. In that the Iowa Supreme Court has acted in such a manner, it is a matter for this Court to take up and set to rights. The Appellant, Marsha McMaster, prays that this Court will do so and will thereby protect her right to privacy.

CONCLUSION

The set of circumstances arising herein is perhaps unusual. In the past, people facing criminal prosecution have sought to have their mental health records suppressed under a right of privacy argument. People who were asked to take psychological testing for job placement have sought a right to privacy and mental health professionals themselves have sought that right when subpoenaed to turn over records. In a sense, each of these had something to gain by asking for the right to privacy in their records.

Marsha McMaster, on the other hand, has nothing to gain except her anonymity and peace of mind. She is not a criminal and has committed no questionable act of any nature. She did not seek mental health assistance in order to help her obtain a job. She is an innocent victim here. Her wrong was in recognizing that she was sick and in

seeking treatment to make her well. In pursuing that goal, she believed that what she said to her mental health professional would be absolutely confidential.

Now, she finds that according to the Iowa Supreme Court's interpretation of the right to privacy in mental health records as a privilege which is limited in scope, her most intimate thoughts, her most vulnerable emotions, her most compelling secrets are to be public against her wishes. This is happening under an almost unbelievable state of facts.

Marsha McMaster was seen by Dr. Todd Hines. She made no objection about the treatment she received. She made no complaint to the Board of Psychology Examiners about the treatment she received. At some point she ended her mental health professional/patient relationship with Dr. Hines and later sought treatment from Susan Guenther.

Now, Dr. Hines is under investigation by the Board. In conjunction with that investigation, the records of Marsha McMaster in the hands of Susan Guenther have been subpoenaed. Why? Because the board thinks they *might* be "relevant" due to the time period of the treatment. Susan Guenther, also a licensee of the Board, is under an obligation to make known to the Board any wrongdoing by any other licensee of the Board of which she has knowledge. She has made no indication to the Board that she has any information that Dr. Todd Hines acted unprofessionally or illegally toward Marsha McMaster.

Yet, the Iowa Supreme Court asserts that under this set of circumstances, the right to privacy in Marsha's

mental health records is not absolute. This is unconstitutional and Ms. McMaster prays that this Court will agree and find that under this set of circumstances, Marsha McMaster has an absolute right to privacy in her medical records.

If the Court declines to find an absolute right to privacy in these circumstances, the Ruling of the Iowa Supreme Court is still unconstitutional. The Iowa Administrative Code, Rule 240, places an obligation on all licensees of the Board to inform the Board of any unprofessional or unethical behavior that he or she is aware of in any other Board licensee.

Susan Guenther is a Board licensee. If she had any information in Marsha McMaster's records which supported the fact that Dr. Todd Hines had acted wrongfully, she is already under a duty to turn that information over to the Board. She has not done so.

Now, the Board, by subpoenaing Marsha's records, seeks to find "somehting" unnamed, something possibly "relevant" in time and avows that it can do so under Iowa Code § 258A. The Iowa Supreme Court agreed and set up rules on how these records may be obtained.

Part of those rules allows an in camera inspection of the records by the Court. The Court then determines "relevancy" and turns over those records it finds "relevant" to the Board. This system is much more intrusive than the system under Iowa Administrative Code, Rule 240. It involves a whole new party, the Court, to view all of the records of Marsha McMaster, make all of her most personal thoughts open to the Court when there is already a less intrusive pathway leading to the same end.

The Ruling of the Iowa Supreme Court by creating a more intrusive option for obtaining Marsha's medical records has interpreted their own statute in a manner which deprives Marsha McMaster unconstitutionally of her right to privacy in a broader manner than the pathway already in existence.

WHEREFORE, the Intervenor herein, Marsha McMaster, prays that this Court will find that under these circumstances, she has an absolute right to privacy in her mental health records in the hands of Susan Guenther. In the alternative, if this Court would find that there is a right to privacy which can be overcome by a compelling state interest, then Marsha prays that this Court will find that the interpretation of the Iowa Supreme Court of Iowa Code § 258A (1991) is unconstitutional in that it provides for in camera inspection by a third party when there is already a less intrusive means of obtaining the same information under Iowa Administrative Code, Rule 240.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

October Term, 1993

MARSHA McMASTER,

Petitioner,

vs.

IOWA BOARD OF PSYCHOLOGY EXAMINERS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Iowa

APPENDIX

IN THE SUPREME COURT OF IOWA

No. 354 / 92-1904

Filed December 22, 1993

MARSHA McMASTER n/k/a/ MARSHA HINES,
Plaintiff,

vs.

IOWA BOARD OF PSYCHOLOGY EXAMINERS
and SUSAN M. GUENTHER,
Defendants.

IOWA BOARD OF PSYCHOLOGY EXAMINERS,

Appellee,

vs. Susan M. Guenther,
Respondent.

MARSHA HINES,

Appellant.

Appeal from the Iowa District Court for Polk County, Richard D. Morr and Glenn E. Pille, Judges.

Patient appeals from district court order directing psychologist to turn over patient records to licensing board. **REVERSED AND REMANDED WITH DIRECTIONS.**

Thomas P. Hyland of Hyland, Laden & Pearson, P.C. Des Moines, for appellant.

LAVORATO, J.

The Iowa board of psychology examiners subpoenaed the records of a patient from a psychologist who was not under investigation. The patient had previously been a patient of a psychologist whom the board was

investigating. The district court entered an order enforcing the subpoena pursuant to Iowa Code section 258A.6 (1991). (Iowa Code chapter 258A (1991) has been transferred to chapter 272C of the 1993 Iowa Code). In challenging the order, the patient raises three questions for us to decide. First, does the mental health professional-patient privilege under Iowa Code section 622.10 bar disclosure? Second, does section 258A.6 authorize the board to subpoena a mental health professional's medical records pertaining to a patient where the professional is not under investigation? Third, would disclosure violate the patient's right of privacy?

We hold that section 622.10 does not bar disclosure. In addition, we hold that section 258A.6 is broad enough to reach the records in the possession of the psychologist not under investigation. We reverse and remand on the right of privacy question to allow the board to make a showing that its need for the records outweighs the patient's right to privacy.

1. Background Facts and Proceedings.

Marsha McMaster sought the professional services of psychologist Todd Hines. Eventually they married. At this point Marsha engaged psychologist Susan Guenther as her personal counselor. Both Todd and Susan are licensed to practice psychology in this state.

The Iowa board of psychology examiners received a complaint regarding Todd Hines. The gist of the complaint concerned some alleged conduct between Todd and Marsha during their psychologist-patient relationship. Marsha was not the source of the complaint.

As part of its investigation the board subpoenaed and received all of Todd's clinical records. The board then informally sought Susan's records regarding Marsha. The board did not seek Marsha's permission for – and Marsha did not authorize – the release of these records. Susan refused to give Marsha's records to the board.

Apparently Marsha became aware of the board's attempt to secure her records from Susan and of the board's intent to subpoena those records. Marsha immediately filed a petition for temporary and permanent injunction and a motion to quash subpoena. The district court, Judge Richard D. Morr, issued a temporary restraining order prohibiting Susan from "releasing or surrendering any and all records in her possessions pertaining to the nature and purpose of the client relationship between [Marsha] and [Susan], to any person, agency, or board." The court also set a hearing on Marsha's request for a permanent restraining order.

A week later, the board served a subpoena duces tecum on Susan, demanding the release of "all clinical records pertaining to Marsha" within five days of the subpoena.

On the date set for hearing on Marsha's request for a permanent restraining order, the board moved to dismiss Marsha's petition. The board alleged the district court lacked jurisdiction because Marsha (1) had not sought judicial review pursuant to Iowa Code chapter 17A, (2) had not exhausted all administrative remedies, and (3) was not aggrieved or adversely affected by any final agency action. Concurrently, the board filed a petition for

enforcement of subpoena pursuant to Iowa Code sections, 17A.13 and 258A.3. The petition named Susan as the respondent.

By agreement of all parties the district court, Judge Glenn E. Pille, entertained Marsha's request to intervene in the board's action for enforcement of its subpoena and granted it. In addition all of the parties agreed to (1) submit personally to the jurisdiction of the court on the board's petition for enforcement of subpoena and (2) consolidate and hear at one time all of the various matters before the court. These matters included (1) Marsha's petition for permanent injunction, (2) the board's motion to dismiss Marsha's petition, (3) the board's petition for enforcement of subpoena, and (4) Marsha's objections as intervenor in the board's action for enforcement of subpoena.

Following the consolidated hearing, Judge Pille found that Marsha's petition and board's motion to dismiss it were moot because all of the parties had agreed to submit personally to the jurisdiction of the court in the board's action to enforce its subpoena. Because the court had personal and subject matter jurisdiction in the board's action, Judge Pille proceeded to a hearing on the merits regarding the petition to enforce subpoena.

Following the hearing, Judge Pille (1) dismissed Marsha's petition for permanent injunction and (2) ordered Susan to comply with the board's subpoena within twenty days of the filing of his ruling. Additionally, Judge Pille stayed enforcement of his order as to Susan provided either Susan or Marsha appealed within the twenty day period.

Marsha filed an application for interlocutory appeal; Susan did not. In a single justice ruling, we determined Judge Pille's ruling was a final decision appealable as a matter of right.

II. Does Iowa Code Section 622.10 Bar Disclosure?

Marsha first contends that the mental health professional-patient privilege in Iowa Code section 622.10 bars disclosure of the records in question. Section 622.10 pertinently provides:

> A practicing attorney, counselor, physician, surgeon, physician's assistant, *mental health professional,* or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment . . . *shall not be allowed, in giving testimony, to disclose any confidential communication* properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.

Although psychologists are not statutorily considered physicians, they do fall into the category of "mental health professionals" mentioned in section 622.10. *See generally* Iowa Code ch. 154B (regulating practice of psychology).

The privilege in section 622.10 is limited to disclosure of confidential communications *by the giving of testimony.* A Subpoena duces tecum does not compel disclosing confidential communications by the giving of testimony. *Chidester v. Needles,* 353 N.W.2d 849, 851-52 (Iowa 1984)

(subpoena does not require disclosure of privileged communications by giving of testimony); *see also Roosevelt Hotel Ltd. Partnership v. Sweeney*, 394 N.W.2d 353, 355 (Iowa 1986) ("Section 622.10 applies only to the testimonial use of privileged information, . . . because it comes into play 'in giving testimony'. Testimony is a declaration by a witness in court or during a deposition.").

Here all that the board attempted to do was secure Marsha's medical records in Susan's custody by way of subpoena. Susan was not subpoenaed to testify. In short, section 622.10 does not apply.

III. Does Iowa Code Section 258A.6 Authorize the Board to Subpoena a Mental Health Professional's Medical Records Pertaining to a Patient Where the Professional is not Under Investigation?

The district court concluded that Iowa Code section 258A.6 authorizes the board to subpoena patient records of a psychologist who is not under investigation. Marsha takes issue with this broad interpretation. She urges here, as she did in the district court, that the subpoena reach in section 258A.6 is limited to patient records of a psychologist who is under investigation.

Iowa Code Section 258A.6 pertinently provides:

> 1. Disciplinary hearings held pursuant this chapter shall be heard by the board sitting as the hearing panel. . . .
>
> 3. The presiding officer of a hearing panel may issue subpoenas pursuant to rules of the board . . . *a subpoena issued under the authority of a*

> *licensing board may compel . . . the production of professional records . . . whether or not privileged or confidential under law,* which are deemed necessary as evidence in connection with a disciplinary proceeding.

(emphasis added).

We think the italicized language is clear. It authorizes the board to issue a subpoena to compel the production of professional records in the custody of *any* mental health professional. The district court correctly determined that the subpoena power of the board was statutorily broad enough to reach Marsha's professional records in Susan's possession.

The fact that the board's statutory authority is broad enough to reach the records of a mental health professional not under investigation does not, however, resolve the controversy. The remaining question is whether there are any limitations to that authority. A determination that there are such limitations leads to another question: What are those limitations? We address these questions in our discussion of the final issue Marsha raises.

IV. Would Disclosure Violate Marsha's Right of Privacy?

Marsha argues here, as she did in the district court, that she has a constitutional right of privacy that would be violated unless she is allowed to keep her communications with Susan privileged and private. In short, she urges that Iowa Code section 258A.6 is unconstitutional as applied to her.

A. *The right of privacy interest.* We have recognized on two occasions that an individual has an interest in avoiding disclosure of personal matter. *See Head v. Colloton,* 331 N.W.2d 870, 876 (Iowa 1983); *accord Chidester,* 353 N.W.2d at 853. The interest is referred to as a right of privacy and is constitutionally protected. *Colloton,* 331 N.W.2d at 876; *accord Chidester,* 353 N.W.2d at 853.

The United States Supreme Court described the components of the privacy interest this way:

> The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.

Whalen v. Roe, 429 U.S. 589, 599-600, 97 S. Ct. 869, 876, 51 L. Ed. 2d 64, 73 (1977) (footnotes omitted). The right of privacy is implicit in the Fourteenth Amendment's concept of personal liberty and as such restricts state action. *Id.* at 599, n.23, 97 S. Ct. at 876, 51 L. Ed. 2d at 73.

B. *Extending the right of privacy to professional records of mental health professionals.* Though not all courts agree, the majority of them hold that the right of privacy should extend to the patient records of mental health professionals. *See In re Zuniga,* 714 F.2d 632, 638-39 and n.3 at 639 (6th Cir.) (citing state and federal jurisdictions that do and do not extend privilege), *cert. denied,* 464 U.S. 983 (1983). We join those courts that extend constitutional protection to such records. Our reasons for doing so are eloquently expressed in the following passage:

> Psychotherapy probes the core of the patient's personality. The patient's most intimate thoughts and emotions are exposed during the course of the treatment. The psychiatric patient confides [in his therapist] more utterly than anyone else in the world . . . [He] lays bare his entire self, his dreams, his fantasies, his sin, and his shame. The patient's innermost thoughts may be so frightening, embarrassing, shameful or morbid that the patient in therapy will struggle to remain sick, rather than to reveal those thoughts even to himself. The possibility that the psychotherapist could be compelled to reveal those communications to anyone . . . can deter persons from seeking needed treatment and destroy treatment in progress.

Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028, 1039 (D. Haw. 1979) (citations omitted) (licensed clinical psychologist and nonprofit corporations made up of 115 psychiatrists sued Hawaii state officials to enjoin enforcement of Hawaii statute authorizing issuance of administrative inspection warrants to search offices and records of Medicaid providers for investigation and prosecution of Medicaid fraud; held that statute was subject to scrutiny under compelling state interests standard).

We think both prongs of the right of privacy interest extend to the records of the mental health professional. A patient has an interest in avoiding disclosure of these records because of the obvious personal and intimate information contained in them. The patient also has an interest in keeping independent the patient's choice to seek the help of mental health professionals. This is so because in some circles a social stigma still attaches to anyone who merely seeks the help of such professionals.

If the patient cannot be assured that the choice to seek help will be kept confidential, that choice is severely limited.

The constitutional privacy interest is not, however, absolute. At most it is a qualified rather than an absolute privilege. *Chidester*, 353 N.W.2d at 853. In determining whether the privilege attaches, we apply a balancing test:

> The privacy interest must always be weighed against such public interests as the societal need for information, and a compelling need for information may override the privacy interest.

Id. The public interest in this case is the board's statutory obligation to police the mental health professions. *See generally*, Iowa Code chs. 147 (regulating professions generally), 154B (regulatinq practice of psychology), 258A (empowering licensing boards to sanction licensees for improper conduct).

C. *Necessary showing.* Procedurally, we impose the burden on the board to establish the need for intrusion on a person's right of privacy. We have no hesitancy in doing so for two reasons. First, the right is constitutionally protected. Second, we think the statute imposes such a burden. *See* Iowa Code § 258A.6(3) ("Upon proper showing, the district court shall order the person to obey the subpoena . . . ").

What showing should the board make to justify intrusion? First, the board should make a minimal showing that the complaint reasonably justifies the issuance of a subpoena in furtherance of the investigation. As one court explained, such showing

> will necessarily vary from case to case. It may relate to the reliability of the complainant; it may be shown by the substance of the complaint. Specific detail as to identification of the complainant, some evidence of [the complainant's] good faith or reliability, disclosure of the basis for [the complainant's] knowledge of the substance of the complaint, with dates to establish its currency, and some revelation of the substance of the complaint will normally suffice, but all or most of this data may not be necessary. Sufficient authenticating detail may be found in the complaint itself; if not, it must by independently supplied.

Levin v. Murawski, 59 N.Y.2d 35, ___, 449 N.E.2d 730, 733-34, 462 N.Y.S.2d 836 (1983) (recital that state medical board had received a third-party complaint alleging professional misconduct, with no identifying or authenticating detail, was insufficient basis for issuing official subpoena for production of medical records).

Second, the board should establish that the records are necessary as evidence in connection with the disciplinary proceeding. This requirement comes right from the statute. *See* Iowa Code § 258A.6(3) ("A subpoena issued under the authority of a licensing board may compel . . . the production of professional records . . . *which are deemed necessary as evidence in connection with a disciplinary proceeding.*") (emphasis added).

To make this determination, the district court will necessarily have to review the medical records in camera and determine whether the records are essential to establishing the allegations of the complaint. Relevancy

becomes a critical issue here. If the district court determines there is not relationship between the records sought and the allegations of the complaint, that should end the matter. *See In re A-85-04-38*, 138 Misc. 2d 786, ___, 525 N.Y.S.2d 479, 481 (1988) (patient's records held by subsequent treating psychiatrist were insufficiently relevant to investigation of another psychiatrist for professional misconduct and could not be subpoenaed by medical board investigating complaint not initiated by patient; basis for subpoena included no allegations remotely involving records). If the court determines there is such a relationship, it should allow the board access to only those portions of the record that are deemed relevant.

In addition, the party subpoenaed should redact from the patient's records all identifying information about the patient before submitting such records to the district court. This requirement is consistent with the statutory provision regarding confidentiality as to a person whose privilege has been involuntarily waived. *See* Iowa Code 258A.6(4) ("Notwithstanding the provisions of section 17A.19 subsection 6 [requirement that agency transmit original record to district court on appeal of agency], if a waiver of privilege has been involuntary and evidence has been received at a disciplinary hearing, the court shall order withheld the identity of the individual whose privilege was waived.")

Third, the board should establish that it notified the patient and attempted to obtain an authorization from the patient for release of the records before issuing the subpoena. *See Wood v. Superior Court*, 166 Cal. App. 2d 1138, ___, 212 Cal. Rptr. 811, 820-21 (1985) (in investigating

medical propriety of prescribing drugs, medical board must take reasonable steps to notify patient of its proposed examination of patient records and attempt to secure authorization to release records.).

Fourth, the board should establish that there are adequate safeguards to prevent unauthorized disclosure. *See United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3rd Cir. 1980) (listing factors to consider in determining whether intrusion into an individual's privacy is justified).

Last, the board should establish whether there is "an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access." *Id.*

D. *The showing here.* In fairness to the board and the district court, neither had the benefit of the foregoing analysis. Consequently, the record lacks a substantial showing for the need to enforce the subpoena and intrude on Marsha's right of privacy. For example, there was no showing of the authenticity of the complaint.

Nor was there any showing beyond conclusory statements that the records are necessary. In this respect one of the board members testified:

> Q. In regard to the records sought by the subpoena, did you determine – why did you determine that those were necessary? A. We have other sources of information that have pointed to the significance of those records in investigating this particular case.
>
> . . .

Q. Are these records relevant to [the contested case pending in regard to . . . Todd Hines]? A. I think so, yes.

. . .

Q. In what way are your records relevant to your investigation to your knowledge, your personal knowledge? A. I believe the records are relevant in terms of the time frame that they cover. I believe they,re relevant to conclusions that may be drawn about the other psychologist's conduct.

. . .

Q. In what way do those records support the conclusions which you have drawn concerning the conduct of this psychologist? A. I don't know that they support it. I believe that they have information relevant.

Q. But you don't know that? A. I don't know that they support it.

Q. You don't know what those records relate to? A. I don't know. I haven't seen them.

In this connection, the district court made no in camera inspection of Marsha's records to establish their relevancy.

The board made no attempt to secure Marsha's authorization for release of the records. Nor did the board attempt to notify her of its intent to subpoena the records. As it turned out, this was not significant because Marsha knew what was happening and was able to resist the board's efforts in court.

Iowa Code section 258A.6(4) does provide confidentiality safeguards to prevent public disclosure of the information in Marsha's records. *See* Iowa Code § 258.6(4) (statutory language broad enough to prevent disclosure of medical records). Such safeguards, however, are only one factor for a court to consider in the balancing process and should not be controlling. This is so because of the unique personal nature of the records. Mental health practitioner's records

> may include the patient's most intimate thoughts and emotions, as well as descriptions of conduct that may be embarrassing or illegal. *The possibility that those records could be disclosed to anyone, whether it be state officials or the public, is sufficient to constitute an intrusion into the right of privacy.*

Hawaii Psychiatric Soc'y, 481 F. Supp. at 1041 (emphasis added).

Finally, we acknowledge that there is a recognizable public interest favoring access. As we said, the board has a statutory obligation to police the mental health professions. Apparently, the board is proceeding against Todd because of some alleged conduct between him and Marsha while she was his patient. However, we have no inkling from the record what that alleged conduct was. We can only speculate that the conduct involved a breach of mental health professional ethics. If that is the case, the public interest is the need for the board to have Marsha's records to carry out its statutory duty to police the mental health professions.

V. Disposition.

Because the record is wholly inadequate to justify an intrusion into Marsha's right of privacy, we must reverse the district court's order enforcing the subpoena. However, we remand to allow the board an opportunity to make the kind of showing this opinion deems necessary to support the board's request for enforcement of its subpoena. If the board elects to proceed to make such a showing, the district court must then determine in accordance with this opinion whether the showing is sufficient to justify the intrusion. In short, the district court must determine whether the board's need for the records substantially outweighs Marsha's privacy interest.

The board may feel hampered in making the necessary showing for the subpoena because of the confidentiality requirement in section 258A.56(4). That provision pertinently provides:

> In order to assure a free flow of information for accomplishing the purposes of this section, and notwithstanding section 622.10, *all complaint files, investigation files other investigation reports, and other investigative information in the possession of a licensing board* or a peer review committee acting under the authority of a licensing board or its employees or agents *which relates to licensee discipline are privileged and confidential, and are not subject to discovery, subpoena, or other means of legal compulsion for their release to a person other than the licensee and the boards,* their employees and agents involved in licensee discipline, *and are not admissible in evidence in a judicial* or administrative *proceeding* other than the proceeding involving licensee discipline. . . .

> However, a final written decision and finding of fact of a licensing board in a disciplinary proceeding . . . is a public record.

(emphasis added).

The district court, however, has broad discretion to enforce this confidentiality requirement without hampering the board's attempt to make the necessary showing for the subpoena. The obvious procedure to accommodate the board's showing and to protect confidentiality is an in camera hearing with a protective order prohibiting disclosure of any evidence presented.

REVERSED AND REMANDED WITH DIRECTIONS.

All justices concur except Carter. and Snell, JJ., who dissent

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CARTER, J. (dissenting).

Without either adopting or rejecting the propositions made in the dissent of Snell J., I would hold, purely as a matter of statutory interpretation, that in enacting section 258A.6 the legislature did not intend to allow the Board to subpoena patient records of a health care professional not under investigation in connection with a disciplinary proceeding.

SNELL, J. (dissenting).

I respectfully dissent.

The majority opinion convincingly presents the case for protecting the confidentiality of communications between a patient and a psychologist from whom professional advice is sought. Authorities are cited that speak eloquently of the need to guard a patient's right of privacy, lest the harsh glare of exposure buries the hope for treatment in the dark recesses of fear. Recognition of this need to provide a measure of protection under law is accorded by the majority in requiring an in camera inspection. However, I believe that the confidentiality thus sought to be protected is compromised by the majority's analysis of the statutes and is inadequately safeguarded by any in camera inspection.

The statute controlling the majority's result is section 253A.6 (1991) captioned "Hearings – Power of Subpoena – Decisions." (currently codified at Iowa Code § 272C.6 (1993)). That section provides subpoena powers to licensing boards authorized to perform various functions set out by the legislature under a general regulation chapter called "Continuing Education and Regulations – Professional and Occupational." (Iowa Code ch. 258A (1991)). Chapter 258A covers general provisions for twenty-seven regulating boards or commissions including shorthand reporters, barber examiners, landscape architect examiners, and hearing aid dealer. *Id.* § 258A.1 (6) (b), (f-g), (v). Section 258A.6 is a general statue applying wholesale to all of the twenty-seven board or commissions grouped under Chapter 258A. Nothing in Section 258A.6 makes any reference to the Board of Psychology Examiners or gives any indication of a legislative intent to dilute or abridge the right of privacy inherently needed in the

patient-psychologist relationship. Actually, a contrary legislative intent is indicated by specifically stating that information privileged against disclosure under section 622.10 shall not be obtained by a licensing board by means of section 258A.6 *Id.* 258A.6 (3). That would include information sought in the instant case from Marsha Hines' psychologist. It is also made clear in the statute on subpoena power that information gathered by the board will lose all privacy protection. *Id.* § 258A.6 (4). Professional records, papers, and correspondence – whether or not privileged or confidential under law – become evidence in the disciplinary proceeding. *Id.* Subsection (4) of section 258A.6 further provides that a final written decision and finding of fact of the licensing board is a public record. *Id.* Thus, the confidential thoughts, fears, hopes and secret dreams of the patient confided to her psychologist may well appear as supporting facts in the board's decision, for all the world to see. Small solace and unlikely anonymity is provided by the statute's authorizing the court to withhold the identity of the patient whose confidences are publicly proclaimed. *See Id.*

We considered the statutory protection given to communications received in professional confidence in *Newman v. Blom*, 249 Iowa 836, 89 N.W.2d 349 (1958). We held that medical records that contained information gathered from a patient were to be considered "confidential communications" under section 622.10 because the records contained information which would be inadmissible at trial as oral testimony from the physician. *Id.* at 843-45, 89 N.W.2d at 354-56. We said:

> Prohibited direct revelations by a doctor cannot be revealed by indirect methods.
>
> We have in the past had several occasions to discuss our privilege statute (section 622.10) and, as to the extent of the matters covered we announced the rule that we will draw no fine lines as to whether a communication, professionally secured, is necessary or unnecessary. The policy of the statute is to provide for great freedom of disclosure by a patient to his physician, for the patient is often in no position to know what disclosures may or may not be necessary for his proper treatment.

Id. at 843, 89 N.W.2d at 354-55 (citations omitted). In *Howard v. Porter*, 240 Iowa 153, 155, 35 N.W.2d 837, 838 (1958), we stated that section 622.10

> should receive a liberal construction designed to carry out its manifest purpose to make consultation by a patient with his physician entirely confidential and free from anticipation or fear that this confidence will be broken by the examination of the physician as a witness in some legal proceedings.

Id. at 844, 89 N.W.2d at 355.

In *Chidester v. Needles*, we cited with approval our construction of section 6232.10 in *Newman*, but distinguished it from the issue involved in *Chidester*. *Chidester v. Needles*, 353 N.W.2d 849, 852 (Iowa 1984). In *Chidester* the issue concerned a nontestimonial setting in which a subpoena duces tecum was issued under Iowa Rule of Criminal Procedure 5 (6) as part of a county attorney's general investigatory power in lieu of a grand jury proceeding. *Id.* We noted that information obtained under rule 5 (6)

may not be used to perpetuated testimony for trial. *Id.* at 852. Moreover, documents produced in response to a county attorney's subpoena remain confidential unless and until criminal charges are filed and the court may thereafter order such documents to remain confidential. Iowa R. Crim. P. 5(6). Under these circumstances, we held that the statutory patient-physician privilege under section 622.10 must yield to the subpoena requirements of Iowa Rule of Criminal Procedure 5(6). *Id.* at 853.

We also held in *Chidester* that the patient's constitutional privacy interest must yield to the state's interest in well-founded criminal charges and the fair administration of criminal justice. *Id.* at 853-54.

The same considerations are not present in the case at bar as in *Chidester.* There are no criminal charges involved or suggested against psychologist Hines, psychologist Guenther, Marsha McMaster Hines or anyone else. Criminal administration is not involved. Further there are no protections in the instant case against disclosure of confidential information, unlike those in *Chidester* found to be of special significance. The fact that the information sought by the Board of Psychology Examiners will be evidence and may well be a public record places this case clearly within the scope of the protection outlined by our court in *Newman* rather than under the narrow sphere of *Chidester.*

The constitutional right of privacy should extend to the patient records of mental health professionals, as held by the majority. However, the majority fractures this principle, by holding that a sufficient showing of need by the Board of Psychology Examiners will prevail over the

right to privacy protection. I do not concede that the privacy privilege can be overcome by any showing of some compelling need for the information sought by the Board of Psychology Examiners.

This case is a poor vehicle for deciding a legal point of such sweeping dimension. We have no idea what information is sought; the Board either does not know or has kept it a secret.

Yet, faced with a vacuum of facts from which to consider whether a compelling interest of the Psychology Board should subjugate the patient's constitutional right of privacy, the majority held it was possible and remanded for the Board to make a showing. In so doing, the court has assumed legitimacy where the United States Supreme Court has cautioned against it.

"Where certain fundamental rights are involved, the Court has held that regulations limiting these rights may be justified only by a compelling state interest, and that legislative enactments must be narrowly drawn to express only the legitimate interest at stake." *Roe v. Wade*, 410 U.S. 113, 155, 93 S. Ct. 705, 728, 35 L. Ed. 147, 178 (1973) (citations omitted). If there are less drastic means to achieve a compelling state interest with a lesser burden on constitutionally protected rights, the state must utilize those means. *Attorney General of New York v. Soto-Lopez*, 476 U. S. 898, 909-10, 106 S. Ct. 2317, 2324, 90 L. Ed. 2d 899, 910 (1986). The state cannot employ means that broadly stifle fundamental liberties when the end can be more narrowly achieved. *Carrol v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183-84, 89 S. Ct. 347, 353, 21 L. Ed 2d 325, 333 (1968).

Moreover, statutes affecting constitutional rights must be "drawn with precision" and must be "tailored to serve" their objectives, *Dunn v. Blumstein*, 405 U.S. 330, 343, 92 S. Ct. 995, 1003, 31 L. Ed. 2d 274, 285 (1972).

This statute, section 258A.6, under the majority's construction of it today, is far from "narrowly tailored." To the contrary, in its protection of a citizen's constitutional privacy rights it leaves the scissors in the hands of licensing boards free to shear off whatever fabric they wish from an individual's raiment of liberties. Chapter 258 is much too broad in scope to allow such an infringement on personal liberty. If an intrusion of this sort is constitutional at all, it should be provided for under a much more precise enactment. The fact that the majority provides for in camera review does not alleviate the constitutional concerns in this case. Nor does the majority's requirement that the Board show that the patient's confidential records are relevant to its investigation provide any real privacy protection. Disagreements about what is relevant have fueled lawyers and judges for hundreds of years. And, whatever decision is made by the district court is appealable through the state or federal appellate process, automatically expanding the in camera inspection to scores or more reviewers. The constitutional right of privacy should not be diminished, as it is, under the facts and law of this case. No citizen should be forced, without compelling reason and adequate constitutional safeguards, to turn over their dreams, fantasies, sins and shame, even to the most sensitive stranger.

q4.5 The Board has already obtained the records of Dr. Hines, who is the subject of its investigation. Other information can be considered through voluntary sources.

There is no compelling state interest to justify the Board's invasion of privacy.

I believe section 622.10 bars the compulsory production of Marsha Hines' patient records from her psychologist, Susan Guenther and section 258A.6 as applied by the majority is of doubtful constitutionality. On this basis I would hold that section 258A.6 does not permit the Board to subpoena records of a person not under investigation in connection with a licensee disciplinary hearing.

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MARSHA McMASTER n/k/a MARSHA HINES, Plaintiff, vs IOWA BOARD OF PSYCHOLOGY EXAMINERS and SUSAN F. GUENTHER, Defendants,	EQUITY NO:CE 23956 PETITION FOR TEMPORARY AND PERMANENT INJUNCTION AND TO QUASH SUBPOENA

DIVISION I.

PETITION FOR TEMPORARY AND PERMANENT INJUNCTION

COMES NOW the Plaintiff, and for her cause of action, states:

1. That Plaintiff is a resident of Polk County, Iowa.

2. That the Defendant, Iowa Board of Psychology Examiners, is a Board created under and existing by virtue of Chapter 147 Code of Iowa.

3. That the Defendant, Susan F. Guenther, is a licensed psychologist currently in private practice in Des Moines, Polk County, Iowa,

4. That the Plaintiff and the Defendant, Susan F. Guenther, have an established professional relationship in that the Plaintiff has employed the services of the said

Susan F. Guenther as Plaintiff's counselor and psychologist.

5. That the Plaintiff is reliably informed that the Defendant, Iowa Board of Psychology Examiners, has issued a Subpoena to Defendant, Susan F. Guenther, for all of Plaintiff's confidential records and documents in the possession of the said Susan F. Guenther.

6. That no action has been filed by the Board of Examiners against Susan F. Guenther and Plaintiff is not aware of any action filed by the Board of Examiners against this Plaintiff.

7. That the documents subpoenaed by the Iowa Board of psychology Examiners are confidential and Plaintiff has not and does not waive the confidentiality of said documents.

8. That said Subpoena is in violation of Plaintiff's right to privacy, confidentiality laws, and unenumerated rights of the Plaintiff guaranteed under the Constitution of the State of Iowa, and the United States of America.

9. That a Temporary and Permanent Injunction should be issued enjoining and restraining the Defendant, Susan F. Guenther, from releasing any records in her possession pertaining to the nature and purpose of the client relationship between Plaintiff and Susan F. Guenther.

10. That the Plaintiff has no plain, speedy and adequate remedy at law.

WHEREFORE, Plaintiff prays that the Court grant a Temporary and Permanent Injunction against the Defendant, Susan F. Guenther, from releasing any and all

records in her possession pertaining to the nature and purpose of the client relationship between Plaintiff and Susan F. Guenther, and the Defendant, Iowa Board of Psychology Examiners, be ordered to pay the costs of this Action, and for such other and further relief as the Court may deem just and equitable in the premises.

DIVISION II.

MOTION TO QUASH SUBPOENA

COMES NOW the Plaintiff, and for her cause of action, states:

1. That she realleges and incorporates paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of Division I in this Division II as though fully set out herein.

2. That said Subpoena has no basis in law or in fact, and involves no action pertaining to this Plaintiff.

3. That said Subpoena should be quashed.

WHEREFORE, Plaintiff prays that the Court Quash the Subpoena of the Defendant, Iowa Board of Psychology Examiners, and declare said Subpoena to be of no force or effect and in violation of the law; and for the costs of this action to be taxed to the Defendant, Iowa Board of Psychology Examiners; and for such other and

further relief as the Court may deem just and equitable in the premises.

HYLAND, LADEN & PEARSON, P.C.

By _____

Tom Hyland
SSN: 315-28-6410
3232 Hubbell Avenue
Des Moines, Iowa 50317
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ATTORNEY FOR PLAINTIFF

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MARSHA McMASTER n/k/a MARSHA HINES, Plaintiff, vs. IOWA BOARD OF PSYCHOLOGY EXAMINERS and SUSAN F. GUENTHER, Defendants.	CE NO:43-23756 AFFIDAVIT

STATE OF IOWA, COUNTY OF POLK, SS:

I, Marsha McMaster, n/k/a Marsha Hines, being first duly sworn on oath, do state and depose that I am the named Plaintiff.

I further state and depose that I have been reliably informed that the Iowa Board of Psychology Examiners intends to subpoena my personal and private records from Susan F. Guenther with whom I have entered into a client patient relationship.

I further state that I am shocked, indignant, and outraged that the Iowa Board of Psychology Examiners intends to subpoena these private records of a very personal nature.

I further state and depose that I will suffer irreparable harm if these records are allowed to be released to any person. I cannot believe that I have no rights that are not protected by the privilege of confidentiality, or that some Board or Agency can subpoena my records when I

am not a party to any proceeding before the Iowa Board Of Psychology Examiners.

I further state that I have never waived the privilege of confidentiality between myself and Susan F. Guenther and I hereby state that I do not and will not waive that privilege.

I further state that I believe if the Court were to allow the release of this information, my constitutional right to privacy and all other rights guaranteed by the Constitution of the State of Iowa and the United States of America would be violated.

I urge the Court to restrain and enjoin Susan F. Guenther from releasing any of my records in her possession that pertain to our professional relationship.

_____

(see verification attached)

VERIFICATION

STATE OF IOWA, COUNTY OF POLK, SS:

I, Marsha McMaster n/k/a Marsha Hines, being first duly sworn upon my oath, depose and state that I have read the statements contained in the foregoing Affidavit and that the statements therein contained are true as I verily believe.

_____

_____

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MARSHA McMASTER, n/k/a MARSHA HINES, Plaintiff, vs. IOWA BOARD OF PSYCHOLOGY EXAMINERS and SUSAN M. GUENTHER, Defendants.	)	NO CE 43-23956 RULING ON MOTIONS
IOWA BOARD OF PSYCHOLOGY EXAMINERS, Petitioner, vs. SUSAN M. GUENTHER, Respondent, and MARSHA HINES, Intervenor.	)	NO CE 43-24173

The above-captioned matters came on for hearing before the undersigned Judge on the 6th day of November, 1992. Plaintiff, Marsha McMaster, n/k/a/ Marsha Hines, was represented at said proceeding by attorney Tom Hyland. The Iowa Board of Psychology Examiners was represented at said proceeding by Assistant Attorney

General Lynette A.F. Donner. Susan M. Guenther was represented by Attorney Dwight James. The Court having reviewed the record and file herein and having heard the evidence and the arguments of counsel, and being otherwise fully advised in the premises finds the following rulings should be entered.

STATEMENT OF THE CASE

The matter originally comes before this Court upon the Petition of Plaintiff, Marsha McMaster (hereafter Marsha Hines), to issue an injunction enjoining Susan M. Guenther from releasing any records in her possession pertaining to the nature and purpose of a client relationship between the Plaintiff and Ms. Guenther, such records apparently being requested by the Iowa Board of Psychology Examiners (Board). The record reflects that a temporary restraining order was issued by Judge R. Morr on October 14, 1992, prohibiting Ms. Guenther from releasing any such records pending hearing on a permanent injunction. The hearing on the permanent injunction was set before the Court for this date at 8:15 a.m.

Upon commencement of the proceedings on the issue of the permanent injunction, the Court was provided with a Petition for Enforcement of Subpoena that had been filed by the Board just minutes before the commencement of the permanent injunction hearing. As indicated above, the Petition names the Board as Petitioner and Susan M. Guenther as the Respondent. Per discussion with counsel of record on the record, the Court granted Marsha Hines the status as Intervenor in that second Petition to allow the Court to reach the merits of the

objections being raised by Marsha Hines to the subpoena, now issued, by the Board.

The Court notes that the Board has filed a Motion to Dismiss the initial Petition (Hines v. Board, CE 43-23956) on the basis of lack of jurisdiction. In view of the agreement of the parties to submit to the jurisdiction of this Court as it pertains to the second Petition before the Court (Board v. Guenther, CE 430-24173), the initial Petition and the Motion to Dismiss therein are moot. The parties and the subject matter of the issuance of the subpoena by the Board are properly before this Court on the second Petition, that being the Petition for Enforcement of Subpoena by the Board.

FACTS

The facts, as established by the record, are relatively undisputed. For the record, the Court finds the facts are as follows:

The Plaintiff, Marsha Hines, a resident of Polk County, Iowa, and the Defendant, Susan M. Guenther, a licensed psychologist currently in private practice in Polk County, Iowa, established a professional relationship, wherein Susan Guenther provided services as a psychologist for Marsha Hines. As per the affidavit of Marsha Hines, (the original of which was filed with her Petition and is incorporated herein by reference, she entered that psychologist-patient relationship with the understanding that her conversations, records and all matters pertaining to her relationship with Susan M. Guenther would be confidential.

As a result of a complaint filed with the Board (a complaint not initiated by Marsha Hines), the Board commenced an investigation of another psychologist, Todd Hines, relative to his conduct with a client of his at the time, Marsha McMaster, who is now known as Marsha Hines, the Plaintiff herein.

The Board believes that the records of psychologist Guenther may be relevant to their investigation regarding the relationship between Todd Hines and his then client, Marsha McMaster.

Pursuant to their investigation, and their beliefs regarding relevancy, the Board, through Dr. Janet McDonough, asked Susan Guenther to provide those records. That initial request for the records was made without a subpoena. Ms. McDonough suggested to Ms. Guenther that Ms. Guenther had an obligation to the Board to produce those records in view of her obligation to cooperate with the Board. Apparently Ms. Guenther declined to produce those records. The Board did not inform Ms. McMaster (now Hines) that they were seeking those records. The Board has never, to this date obtained any consent from Ms. McMaster (Hines) to obtain those records, and, in fact, Marsha McMaster (Hines) has vehemently objected to the production of those records on the basis of confidentiality between herself and Ms. Guenther. Per the affidavit of Ms. McMaster (Hines) she continues to object to the production of those documents and has indicated she does not and will not waive any privilege in regard to the same. She strongly asserts her rights to privacy in that regard.

Apparently as a result of the informal request for the records, Marsha McMaster (Hines) filed the Petition for temporary and permanent injunction. The record now reflects that a formal subpoena was issued by the Board of Psychology Examiners on October 12, 1992, demanding that Defendant Susan Guenther submit copies of all clinical records pertaining to Marsha Hines to its investigator, Rudy Vasquez, within five days of notice. Said subpoena was served on the 21st day of October, 1992, by Mr. Vasquez. A copy of said subpoena is attached as Exhibit A to the Board's Petition for Enforcement of Subpoena (CE 43-24173). Per that document, the subpoena was issued under the provisions of Section 258A.6 and 17A.13 of the Code of Iowa.

The Court finds that there is currently no action or pending investigation by the Iowa Board of Psychology Examiners against or concerning psychologist Susan M. Guenther. Similarly, there is no action pending by the Board against Marsha McMaster, n/k/a Marsha Hines.

Marsha Hines continues to object to the subpoena and the release of any information contained in the records of psychologist Susan M. Guenther on the basis of the privilege of confidentiality.

CONCLUSIONS

As indicated above, in view of the consent of the parties to the jurisdiction of this Court regarding the second Petition (Iowa Board of Psychology Examiners v. Guenther, CE 43-24173), the Court need not address the issues raised by the Board's Motion to Dismiss the initial Petition (McMaster v. Board, CE 43-23956). Because the

issues raised or sought to be raised by the Plaintiff in this first action are properly before the Court in the second action, this Court, for purposes of procedural clarity, concludes the initial action (CE 43-23956) should be dismissed as hereunder ordered. The Court will address the issues raised by the parties under the second Petition (CE 43-24173).

ISSUE: SHOULD THE COURT ENFORCE THE ADMINISTRATIVE SUBPOENA ISSUED BY THE IOWA BOARD OF PSYCHOLOGY EXAMINERS TO OBTAIN CONFIDENTIAL PATIENT RECORDS OF A PSYCHOLOGIST (GUENTHER) WHO IS NOT UNDER INVESTIGATION AND WHOSE PATIENT (McMASTER) OBJECTS TO THE PRODUCTION OF THE SAME BASED ON THE PRIVILEGE OF CONFIDENTIALITY?

The Plaintiff in this case, Marsha Hines, argues that Iowa Code Section 622.10 (1991) prohibits Susan Guenther from disclosing any confidential communications properly entrusted to her while she treated Marsha Hines in her professional capacity. Additionally, Ms. Hines argues that Section 258A.6 of the Code (1991) does not abrogate the psychologist-patient privilege granted by Section 622.10. Specifically, Ms. Hines argues that the power of the Board under 258A.6 of the Code is not unlimited and as such the psychologist-patient privilege should be recognized. Additionally, Plaintiff argues, especially in this situation, where psychologist Guenther is not the subject of an investigation by the Board, that Section 258A.6 does not extend to her records. Additionally, Ms. Hines argues that Section 258A.6 is unconstitutional as it would apply to Ms. Hines' records being held by psychologist Guenther because it violates Ms.

Hines' constitutional right to "zones of privacy". All counsel concede that Section 258A.6 is the relevant statute herein. The relevant portions of Section 258A.6 provide as follows:

> 3. . . . A subpoena issued under the authority of a licensing board may compel . . . the production of professional records, books, papers, correspondence and other records, *whether or not privileged or confidential under law,* which are deemed necessary as evidence in connection with a disciplinary proceeding.
>
> Nothing in this subsection shall be deemed to enable a licensing board to compel an attorney of the licensee, or stenographer or confidential clerk of the attorney, to disclose any information when privileged against disclosure by section 622.10. In the event of a refusal to obey a subpoena, the licensing board may petition the district court for its enforcement. Upon proper showing, the district court shall order the person to obey the subpoena . . .
>
> 4. In order to assure a free flow of information for accomplishing the purposes of this section, and notwithstanding section 622.10, all complaint files, investigation files, and other investigation reports, and other investigative information in the possession of a licensing board . . . which relates to licensee discipline are privileged and confidential, and are not subject to discovery, subpoena or other means of legal compulsion for their release to a person other than the licensee and the boards, their employees and agents involved in licensee discipline, and are not admissible in evidence in a

> judicial or administrative proceeding other than the proceeding involving licensee discipline. . . .
>
> Notwithstanding the provisions of section 17A.19, subsection 6, if a waiver of privilege has been involuntary and evidence has been received at a disciplinary hearing, the court shall order withheld the identity of the individual whose privilege was waived.

As noted above, Hines argues that Section 622.10 prohibits Susan Guenther from disclosing any confidential communication properly entrusted to her while she treated Marsha Hines in her professional capacity. While the Court agrees Section 622.10 creates a statutory privilege between a "mental health professional" and that practitioner's client, the plain reading of Section 258A.6 appears to abrogate that privilege. Per Iowa Code Section 258A.6(3) (1991):

> A subpoena issued under the authority of a licensing board may compel . . . the production of professional records, books, papers, correspondence and other records, *whether or not privileged or confidential under the law,* which are deemed necessary as evidence in connection with a disciplinary proceeding. (emphasis added by this Court.)

Were the privilege asserted by Hines herein created by common law, there might well be an argument that the legislature could not abrogate it, but here, the privilege claimed was created by statute (the legislature), and the legislature is free to determine its exceptions. In this case, it is clear, by a plain reading of the statute (Section 258A.6) that the legislature has created an exception to the privilege.

Hines further argues that a reading of the entire statute, its exceptions and relevant portions of the Iowa Administrative Code (Section 645 I.A.C. Section 180.121) suggest that abrogation of the privilege does not apply in this situation because Susan Guenther is not the licensee under investigation. The Court is not convinced of Hines' interpretation of the statute.

While it is true the statute (Section 258A.6) creates exceptions to its abrogation of the privilege (i.e., the attorney for the licensee cannot be compelled to disclose information), it does not create an exception for records of psychologists not under investigation. Statutory construction rules, more specifically *inclusio unius est exclusio alterius*, would indicate that by including or speaking specifically to one exception (herein the attorney-client privilege), the legislature intended to ignore the other possible exceptions (i.e., the mental health practitioner-client privilege when the mental health practitioner is not under investigation). Nor does this Court read Section 645 Iowa Administrative Code Section 180.121 to provide the limited parameters suggested by Hines herein.

In furtherance of this Court's interpretation of the statute and in response to the claim of privilege asserted by Hines, the Court notes that the statute itself addresses the need to balance the privilege asserted on one hand with the need of the State to properly investigate and discipline professions through its licensing boards on the other. Iowa Code Section 258A.6(4) clearly provides that the records or reports in the possession the licensing board "are privileged and confidential. . . . " It is apparent the legislature considered the types of concerns raised by Hines herein in making such provisions in the statute.

Lastly, the Court notes that Hines claims Section 258A.6 is unconstitutional as applied to her. She claims she has a constitutional right of privacy that would be violated unless she is allowed to keep her communications with Susan Guenther privileged and private.

Having balanced the interest involved and considered the protections provided that privilege as set forth in Section 258A.6(4), this Court cannot conclude the statute is unconstitutional as applied to Ms. Hines herein.

Accordingly, the Court concludes the Petition for the Board to enforce the Subpoena should be sustained as ordered hereunder.

In view of the constitutional issues raised and the rights affected herein, the Court grants the Respondent, Susan Guenther, twenty days from the date of this order to comply. If this matter is appealed within said twenty days by either the Respondent, Susan Guenther, or the Intervenor, Marsha McMaster Hines, this Court's order of enforcement shall be automatically stayed pending resolution of the appeal.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petition filed herein as Marsha McMaster, n/k/a Marsha Hines, as Plaintiff versus Iowa Board of Psychology Examiners and Susan M. Guenther, docketed as CE 43-23956, be and the same is hereby DISMISSED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Petition for Enforcement of Subpoena

filed herein by the Iowa Board of Psychology Examiners and involving Susan M. Guenther as Respondent and Marsha Hines as Intervenor, docketed as Equity No. CE 4324173, is hereby SUSTAINED; and Susan M. Guenther shall comply with the subpoena served on her regarding the above-captioned matter within twenty days from the date of the filing of this order, with the proviso that if either the Respondent, Susan Guenther, or Intervenor, Marsha Hines, appeals this matter to the Iowa Supreme Court within twenty days of the date of this order, this Court's order of enforcement shall be automatically stayed pending resolution of that appeal.

DATED this 13th day of November, 1992.

GLENN E. PILLE, Judge
Fifth Judicial District of Iowa

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MARSHA McMASTER, n/k/a MARSHA HINES, Plaintiff,	)	CE NO: 43-23956
vs.	)	TEMPORARY RESTRAINING ORDER
IOWA BOARD OF PSYCHOLOGY EXAMINERS and SUSAN M. GUENTHER, Defendants.	)	

NOW, on this 14 day of October, 1992, this matter having come on before the Court upon the Petition of the Plaintiff supported by Affidavit, and the Court having inspected the records and being otherwise fully advised in the premises, FINDS: that a Temporary Restraining Order should be issued.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant, Susan F. Guenther, be and she is hereby temporarily restrained and enjoined from releasing or surrendering any and all records in her possession pertaining to the nature and purpose of the client relationship between the Plaintiff and the said Susan F. Guenther, to any person, agency or board.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said Restraining Order be issued without the necessity of bond.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that hearing on the Plaintiff's Petition for Permanent Restraining Order be and the same is hereby set for the 6th day of November, 1992, at 8:15 a.m.

JUDGE – FIFTH JUDICIAL DISTRICT

SUPREME COURT, U.S.
FILED
MAY 16 1994
OFFICE OF THE CLERK

No. 93-1655

In The

Supreme Court of the United States

October Term, 1993

MARSHA McMASTER,

Petitioner,

v.

IOWA BOARD OF PSYCHOLOGY EXAMINERS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Iowa

RESPONDENT'S BRIEF IN OPPOSITION

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ADDITIONAL STATUTES INVOLVED

In addition to provisions included in the Petition's appendix, the following Iowa Statutes are relevant.

Iowa Code § 258A.6 (1991) Hearings – power of subpoenas – decisions. (currently § 272C.6 (1993))

> 3. The presiding officer of a hearing panel may issue subpoenas pursuant to rules of the board on behalf of the board or on behalf of the licensee. A licensee may have subpoenas issued on the licensee's behalf. A subpoena issued under the authority of a licensing board may compel the attendance of witnesses and the production of professional records, books, papers, correspondence and other records, whether or not privileged or confidential under law, which are deemed necessary as evidence in connection with a disciplinary proceeding.
>
> Nothing in this subsection shall be deemed to enable a licensing board to compel an attorney of the licensee, or stenographer or confidential clerk of the attorney, to disclose any information when privileged against disclosure by section 622.10. In the event of a refusal to obey a subpoena, the licensing board may petition the district court for its enforcement. Upon proper showing, the district court shall order the person to obey the subpoena, and if the person fails to obey the order of the court the person may be found guilty of contempt of court. . . .

Iowa Code § 622.10 (1993) Communications in professional confidence – exceptions – application to court.

> A practicing attorney, counselor, physician, surgeon, physician's assistant, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment, or a member of the clergy shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline. . . .
>
> For the purposes of this section, "mental health professional" means a psychologist licensed under chapter 154B. . . .

STATEMENT OF THE CASE

The Iowa Board of Psychology Examiners (Board) issued a subpoena to Dr. Guenther, a psychologist, for the records of her patient, petitioner Marsha McManus. Although Dr. Guenther was not under investigation, McManus had previously been a patient of another psychologist who was under investigation by the Board at the time of issuance of the subpoena.

McManus filed an action in state district court to enjoin Dr. Guenther from complying with the subpoena alleging that the records were privileged and confidential pursuant to federal and state constitutional provisions and Iowa Code section 622.10. (Pet. App. 25-28) The

Board filed an action to enforce the subpoena asserting that its authority to subpoena such information under Iowa Code section 258A.6 abrogated any confidentiality in section 622.10. (Pet. App. 31-35)

The district court ruled that the subpoena should be enforced and that Iowa Code section 622.10 does not preclude the Board's authority to subpoena the information pursuant to Iowa Code section 258A.6. (Pet. App. 31-41)

Petitioner appealed to the Iowa Supreme Court arguing that Iowa Code section 622.10 precludes release of the subpoenaed information and that the release of such information would violate her constitutional right to privacy. (Pet. App. 2)

The Iowa Supreme Court found that Iowa Code section 622.10 did not bar disclosure of the information but that the petitioner did have a constitutional right of privacy in the records. *McMaster v. Iowa Board of Psychology Examiners*, No. 92-1904 (Iowa Sup. Ct. Dec. 22, 1993). (Pet. App. 1-24) The court found that constitutional right to be qualified, however, and remanded the case to the district court to allow the Board to produce evidence that its need for the records outweighed the petitioner's constitutional right to privacy. The evidentiary hearing has not yet been held. The records at present have not been produced, and McManus' constitutional right to privacy remains.

SUMMARY OF THE ARGUMENT

McManus' first issue presents no question for review. The Iowa Supreme Court found that the records of a mental health professional are constitutionally protected in *McMaster v. Iowa Board of Psychology Examiners*, (Pet. App. 1). Because there is no dispute that there is a constitutional right to privacy, there is no case or controversy and thus no jurisdiction to review this issue.

The state court ruling that is the subject of this action is not a final judgment for purposes of review. The Iowa Supreme Court found that the right to privacy was qualified and that the respondent could overcome that right. The court remanded the matter to the district court to allow the Board to demonstrate that its need for the subpoenaed records overcomes petitioner's right to privacy. Because the Iowa Supreme Court's ruling remanded the matter for further evidentiary findings, it is not a final judgment. This Court lacks jurisdiction.

The Iowa Supreme Court's ruling does not raise a substantial federal question. This Court has previously found that the constitutional right to privacy is not absolute and may give way to a compelling, legitimate state interest. The Iowa Supreme Court has not deviated from this.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS JURISDICTION BECAUSE THERE IS NO ACTUAL CASE OR CONTROVERSY AS REQUIRED BY ARTICLE III OF THE CONSTITUTION.

The Iowa Supreme Court held that the records of a treating psychologist are indeed constitutionally protected. The Board does not challenge that ruling. Because there is no dispute that there is such a constitutional right, there is no case or controversy and thus no jurisdiction to review this issue.

To establish jurisdiction, Article III of the United States Constitution requires that there be a case or controversy. If both parties affirmatively seek the same result, there is no case or controversy and thus no jurisdiction. *See* 13 Wright, Miller, & Cooper, Federal Practice and Procedure: Jurisdiction 2d. § 3530 (1984).

In *Moore v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 47 (1971) the Supreme Court found no case or controversy and dismissed the case for lack of jurisdiction when both parties sought the same result. The Court stated "[w]e are thus confronted with the anomaly that both litigants desire precisely the same result, namely a holding that the anti-busing statute is constitutional. There is, therefore, no case or controversy within the meaning of Art. III of the Constitution." *Id.* at 48.

In this case, McManus argued before the Iowa Supreme Court that the right to privacy in the records of a mental health professional is constitutionally protected.

(Pet. App. 7) The Iowa Supreme Court agreed. In *McMaster v. Iowa Board of Psychology Examiners*, the court stated "[t]hough not all courts agree, the majority of them hold that the right of privacy should extend to the patient records of mental health professionals. (cites omitted) We join those courts that extend constitutional protection to such records." (Pet. App. 8)

As both McManus and the Board agree that the patient records of mental health professionals are constitutionally protected, there is no case or controversy and this Court lacks jurisdiction in this matter.

II. THIS COURT LACKS JURISDICTION BECAUSE THE STATE COURT JUDGMENT AT ISSUE IS NOT A FINAL JUDGMENT FOR PURPOSES OF 28 U.S.C § 1257.

Only final judgments of a state court may be reviewed by this Court. *See* 28 U.S.C.A. § 1257. This state court ruling is not a final judgment.

Generally, when anything further remains to be determined by a state court, there is not a final judgment and this Court lacks jurisdiction. *See Flynt v. Ohio*, 451 U.S. 619 (1981). *See also Uphaus v. Wyman*, 360 U.S. 72 (1959) (not a final judgment when the state supreme court remanded to the trial court to determine whether to enforce a subpoena).

The Iowa Supreme Court established criteria that must be met by the Board in order to overcome the right to privacy and obtain the subpoenaed records. *See McMaster v. Iowa Board of Psychology Examiners*, (Pet. App.

1). The Court remanded to the district court to allow the Board to meet these criteria. The hearing has not been held. The records have not been ordered produced.

Until the district court makes a determination of whether the Board is entitled to the subpoenaed records, there is no final judgment for review.

III. THE IOWA SUPREME COURT'S DECISION THAT THE PRIVACY RIGHT IN MENTAL HEALTH RECORDS IS NOT ABSOLUTE DOES NOT PRESENT ANY IMPORTANT QUESTIONS OF FEDERAL LAW.

McManus suggests the right to privacy in records of a mental health professional is absolute. McManus further suggests the Iowa Supreme Court allowed an unconstitutional intrusion on that right by allowing the Board to make a showing to overcome the qualified right to privacy. Neither suggestion raises a substantial federal question.

The constitutional right to privacy is not absolute. The right to privacy may give way to a compelling and legitimate state interest. *See Roe v. Wade*, 410 U.S. 113 (1974) (state's interest in protecting the life and health of the mother and child override the mother's right to privacy); *Whalen v. Roe*, 429 U.S. 589 (1977) (state's interest in controlling drug abuse by requiring reporting of prescriptions of certain drugs did not violate the constitutional right to privacy); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (reaffirms *Roe v. Wade* right to privacy is not absolute).

Iowa has not deviated from this Court's decisions in finding the right to privacy is not absolute and its ruling is in compliance with such decisions. (Sup. Ct. Rule 10)

Iowa has a legitimate and compelling interest under its police power in regulating professional practice, long recognized by the Supreme Court. *See Dent v. West Virginia,* 129 U.S. 114 (1889). *See also State v. Otterholt,* 15 N.W.2d 529 (Iowa 1944); *Craven v. Bierring,* 269 N.W.2d 801 (Iowa 1936).

The determination whether the Board has a legitimate and sufficient interest in the records to overcome McManus' privacy right is based on the specific facts of the case. No determination has yet been made.

CONCLUSION

For the above stated reasons, the Iowa Board of Psychology Examiners respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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